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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

THE STATE OF CALIFORNIA,
by its Attorney General,
JOHN K. VAN DE KAMP,
Petitioner,

vs.

AMERICAN STORES COMPANY,
ALPHA BETA STORES, INC.,
LUCKY STORES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
MICHAEL J. STRUMWASSER
Special Assistant Attorney
General
SANFORD N. GRUSKIN
Assistant Attorney General
*H. CHESTER HORN, JR.
LAWRENCE R. TAPPER
ERNEST MARTINEZ
Deputy Attorneys General
3580 Wilshire Blvd., Suite 500
Los Angeles, Cal. 90010
Telephone: (213) 736-7515
Attorneys for Petitioner
State of California
**Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

The Ninth Circuit's decision presents the following fundamental questions concerning the availability of injunctive relief under section 16 of the Clayton Act to remedy mergers violating section 7 of the Clayton Act:

1. Whether divestiture is a form of "injunctive relief" under section 16 of the Clayton Act.

2. Whether the Court of Appeals erred by reversing a District Court's preliminary injunction preserving the possibility of divestiture, which the District Court found essential to effective relief, on the ground that such divestiture was not authorized by section 16 of the Clayton Act to remedy violations of section 7 of the act.

The Ninth Circuit's decision was based on its prior decision in *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) (*IT&T*), holding that the legislative history of section 16 barred the remedy of divestiture to antitrust plaintiffs. The decision below and *IT&T* both conflict directly with the First Circuit's decision in *CIA Petrolera Caribe, Inc.* v. *ARCO Caribbean, Inc.*,754 F.2d 404 (1st Cir. 1985), holding that neither the legislative history of section 16 nor any justifiable policy of antitrust enforcement supported such an unwarranted invasion of the equitable powers of District Courts.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the petitioner, the State of California, and the respondents American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc.

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LUCKY STORES, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner State of California ("California") respectfully prays that a writ of certiorari issue to review the March 31, 1989, judgment and opinion of the United States Court of Appeals for the Ninth Circuit, reversing the granting of a preliminary injunction that halted the merger of Lucky Stores, Inc. ("Lucky"), the largest supermarket chain in California, with American Stores, Inc. ("American"), owner of the fourth largest. The Ninth Circuit's opinion held that, despite finding "overwhelming statistical evidence . . . that the merger will substantially lessen competition in violation of Section 7 of the Clayton Act," causing consumers to be "substantially

and irreparably harmed," the District Court was powerless to enjoin the merger. The court's decision was based solely on the fact that American had acquired Lucky stock during Federal Trade Commission (FTC) review, even though the firms were ordered by the FTC to hold their operations separate.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 872 F.2d 837, and is reprinted in Appendix A hereto, *infra*. The memorandum and order of the United States District Court for the Central District of California (Kenyon, D.J.) is reported at 697 F. Supp. 1125, and is reprinted in Appendix B hereto, *infra*.

JURISDICTION

The Ninth Circuit entered its judgment on March 31, 1989. Petitioner's timely petition for rehearing and suggestion for rehearing *en banc* was denied on July 3, 1989. (Appendix C, *infra*.) This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. section 18 (1982):

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . of any other corporation also engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Section 16 of the Clayton Act, 15 U.S.C. section 26 (1982):

> "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . ."

STATEMENT OF THE CASE

On March 21, 1988, American initiated a hostile takeover bid for the Lucky supermarket chain with the intent of merging Lucky's operations in California with those of American's Alpha Beta Stores, Inc. ("Alpha Beta"), bringing under one management 592 California supermarkets.[1] (872 F.2d at p. 839.) Pursuant to the Hart-Scott-

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[1]When American Stores launched its tender-offer, Lucky was the largest supermarket chain in California, while Alpha Beta was the fourth largest. (872 F.2d at 839.) The proposed Alpha Beta-Lucky merger was announced while another major acquisition, Von's purchase of the 172 supermarkets comprising Safeway's Southern California Division, was also pending before the FTC. (See 697 F.Supp. at p. 1127; ER 616.) The following table illustrates the size of the four firms whose acquisition activities were necessarily considered by the District Court (ER 616):

	California			United States		
Supermarket of Chain	Rank	Annual $ Sales (billions)	No. of Stores	Rank	Annual $ Sales (billions)	No. of Stores
Lucky	1	4.13	340	6	7.0	481
Safeway	2	3.73	327	2	17.0	1500
Vons	3	3.13	197	10	3.17	190
American Stores (Alpha Beta)	4	2.44	252	3	14.3	1590

Rodino Antitrust Improvements Act (H-S-R) (15 U.S.C. § 18a), American Stores gave notice of its intentions to the FTC. (872 F.2d, at pp. 839-40.)

California immediately began to review the Lucky acquisition. In mid-April, American Stores delivered some 72 boxes of documents and hundreds of pages of interrogatory responses comprising its H-S-R filing with the FTC to petitioner. (ER 594.) Petitioner retained three economists with national reputations as experts in retail food distribution to advise it concerning the competitive implications of American Stores' acquisition of Lucky (ER 30, 142, 153, 175, 600 and 990).

On May 23, American Stores increased its tender offer, and Lucky's board approved a merger of the two firms. (872 F.2d at p. 840.) The FTC concluded that the merger, as proposed, would violate section 7 of the Clayton Act (15 U.S.C. § 18) and section 5 of the Federal Trade Commission Act (15 U.S.C. § 45). On May 31, 1988 — eight days after Lucky agreed to the merger and six weeks after California received the H-S-R materials — the FTC issued an administrative complaint alleging substantial injuries to competition in the retail sale and distribution of food and grocery items in supermarkets throughout California. (ER 598Y-CC.)

Simultaneous with publication of the complaint, the FTC released a proposed consent order its staff had negotiated with American, proposing settlement of its complaint in exchange for American's agreement to certain conditions. (872 F.2d at p. 840.) The FTC solicited

public comment on the proposed consent agreement pursuant to its regulations governing consent agreement procedures. (16 C.F.R § 3.25 (f).) The FTC also entered into a Hold Separate Agreement with American requiring it to hold the operations of Lucky separate from those of Alpha Beta until the completion of the Commission's review of the proposed consent order, including review of the public comments required under the Commission's regulations. (697 F.Supp. at pp. 1133-34.)

Throughout this period petitioner repeatedly warned American that failure of the FTC to remedy California's concerns could result in this action. (697 F.Supp. at p. 1135.) American ignored these warnings and on June 1, 1988 — just two days after the FTC opened its comment period — commenced its purchase of the Lucky shares. (697 F.Supp. at p. 1135.) By June 2, American had acquired more than 94% of Lucky's outstanding shares. (ER 596.) On June 9, American Stores completed its acquisition of the Lucky stock by accomplishing a short-form merger under Delaware law. (*Ibid.*)

On July 22, 1988, petitioner filed timely comments with the FTC analyzing the substantial harm the Lucky acquisition threatened to California consumers and recommending withdrawal of the FTC's proposed consent agreement. (697 F.Supp. at p. 1135.) On August 31, 1988, the FTC gave final approval to the proposed consent order without modification to address any of the concerns expressed by petitioner. (697 F.Supp. at p. 1135.)

Having concluded that the merger presented a serious threat to California consumers, petitioner filed this suit on September 1, 1988, the day after the FTC's final action (*ibid.*), invoking jurisdiction under 28 U.S.C. section 1331 and 15 U.S.C. section 26. The preliminary injunction was

granted on September 29, 1988 (697 F.Supp. 1125), requiring American to:

1. Take all steps necessary to operate American, Alpha Beta, and their respective subsidiaries, divisions and groups independently of the assets and businesses of Lucky in the State of California.

2. Refrain from taking any action to modify the September 6, 1988, status quo as to the California operations of Alpha Beta or Lucky other than in the ordinary course of business, and to refrain from taking any further steps to merge or integrate the assets and businesses of American's Alpha Beta California operations and those of Lucky's California operations.

Two of the District Court's findings supporting this order require emphasis:

(1) The District Court found that the statistical evidence presented by petitioner concerning the probable effects of this merger, even assuming compliance with the conditions imposed by the FTC's consent order, "overwhelmingly create[d] the presumption that the increased concentration in the relevant markets which would result from the merger between Lucky and Alpha Beta supermarket chains would substantially lessen competition in those markets, and present[ed] a prima facie violation of Section 7 of the Clayton Act." (697 F.Supp at p. 1131.)

(2) The District Court found that "unless the defendants are enjoined [from completing the merger of Lucky and Alpha Beta], the citizens of California will be substantially and irreparably harmed." (697 F.Supp. at p. 1135.)

In arriving at these conclusions, the District Court rejected respondents' argument that this merger was "completed" when the Lucky stock purchase was accomplished and found that the effect of the FTC's Hold Separate Agreement was to insure that Lucky and Alpha Beta "retain[ed] their separate names and with them their respective corporate identities." (697 F.Supp. at p. 1134.) But the District Court found that absent an injunction, American Stores could "restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent." (*Ibid.*) The District Court concluded that the preliminary injunction was necessary "to remedy effectively the unlawful merger." (*Ibid.*)

On appeal, the Ninth Circuit affirmed the District Court's findings concerning the likelihood that California would prevail on its claim that this merger violates section 7 of the Clayton Act. (872 F.2d at pp. 840-44.) The Court of Appeals did not disagree that California had sustained its burden of proving the need for preliminary injunctive relief. (872 F.2d at p. 844.) However, the Court of Appeals held that the preliminary injunction ordered by the District Court was "overly broad" and an abuse of discretion because it ordered "American Stores to operate its subsidiaries [Alpha Beta and Lucky] separately . . . ." (872 F.2d at pp. 845-46.)

The Court of Appeals reasoned that the preliminary injunction was designed either to preserve the possibility of divestiture or to require the permanent separation of the Lucky and Alpha Beta operations in California. (872 F.2d at pp. 844-46.) As to permanent divestiture, the court applied its earlier holding in *International Telephone & Telegraph Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975) (*IT&T*) that divestiture was not a remedy available under section 16 of the Clayton Act, to conclude that California was not entitled to divestiture here. (872 F.2d at p. 845.) As to

permanent separation of the two companies, the court reasoned that the order exceeded the District Court's jurisdiction, since the "preliminary injunction . . . prevents American Stores from exercising an important form of control over its wholly-owned subsidiaries: it requires Lucky and Alpha Beta, though both owned by American Stores, to act as competitors." (*Ibid.*) From this, the court concluded that the preliminary injunction is defective because it required "indirect divestiture," also prohibited by *IT&T*. (*Ibid.*) Because it found that the preliminary injunction was designed to preserve relief not available to California under its previous interpretations of section 16 of the Clayton Act, the court struck it down as "overly broad." (872 F.2d at pp. 845-46.)

The Court of Appeals agreed that, although not entitled to divestiture, petitioner had demonstrated the need for injunctive relief. (872 F.2d at pp. 844, 846.) In remanding to the District Court, the Court of Appeals held that the lower court was limited to "relief 'directed at the symptoms rather than the underlying cause'" of the injury threatened by American Stores' unlawful acquisition. (872 F.2d at p. 846.)

REASONS FOR GRANTING THE WRIT

The First and Ninth Circuits have reached opposite conclusions on the important question whether section 16 of the Clayton Act authorizes district courts to order divestiture to remedy mergers which violate section 7 of the Clayton Act. California respectfully urges this Court to resolve that conflict by granting certiorari and reversing the decision of the Ninth Circuit. This divergence has led to a split of authority in the Second and Third Circuits, which disagree with the Ninth, and courts in the Sixth, Seventh, and Tenth, which follow the Ninth.

The Court should review the "no-divestiture" rule because its absolute bar to an effective remedy against illegal mergers is unwarranted by the language of section 16, its legislative history, or any of the policies underlying the antitrust laws and equitable principles. The Ninth Circuit's corollary rule prohibiting "indirect divestiture," places additional, unwarranted restraints on the ability of district courts to deal effectively with mergers violating section 7.

The Ninth Circuit's decision, unless overturned by this Court, will preclude the District Court from considering the remedy which has long been recognized as the surest weapon against unlawful mergers. As a practical matter, such a result will prevent California from securing relief preventing the very harm section 7 of the Clayton Act was designed to prevent — the aggregation of undue market power. Instead, the Ninth Circuit's rule condemns California consumers and the District Court on remand to the uncertain prospect of "symptomatic" injunctive remedies which, at best, will take years to mitigate the proven injury threatened by American Stores' unlawful acquisition of Lucky.

I.

A DECISION FROM THIS COURT IS ESSENTIAL TO RESOLVE A RECURRING CONFLICT AMONG THE CIRCUIT AND DISTRICT COURTS ON THE AVAILABILITY OF DIVESTITURE UNDER SECTION 16 OF THE CLAYTON ACT AND TO RESTORE UNIFORM ENFORCEMENT OF THE NATION'S ANTITRUST LAWS

IT&T and the decision below conflict directly with the decision of the First Circuit Court of Appeals in *CIA Petrolera Caribe, Inc.* v. *ARCO Caribbean, Inc.*, 754 F.2d

404 (1st Cir. 1985) holding that divestiture is a form of injunctive relief available to plaintiffs under section 16 of the Clayton Act. The same opinion was expressed by the Third Circuit in dictum. (*NBO Industries Treadway Cos., Inc.* v. *Brunswick Corp.*, 523 F.2d 262 (3d Cir. 1975).) A number of district courts have reached the same conclusion. (See *Consolidated Gold Fields, PLC.* v. *Anglo American Corp.*, 1989 Trade Cases ¶ 68,536 (S.D.N.Y. 1989) (hold separate order and divestiture available); *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F.Supp. 1250, 1255-56 (E.D.Pa. 1987) (divestiture available); *Joseph Ciccone & Sons* v. *Eastern Ind.*, 537 F.Supp. 623, 630 (E.D.Pa. 1982); *Nasso Concrete Corp.* v. *DIC Concrete Corp.*, 467 F.Supp. 1016 (S.D.N.Y. 1979) (divestiture available); *Julius M. Ames Co.* v. *Bostitch, Inc.*, 240 F. Supp. 521, 526 (S.D.N.Y. 1965) (divestiture available).) Other courts have followed the Ninth Circuit. (See *Arthur S. Langenderfer, Inc.* v. *S.E. Johnson Co.*, 729 F.2d 1050, 1060 (6th Cir.); *cert. denied,* 469 U.S. 1036, 105 S.Ct. 510, 83 L.Ed.2d 401 (1984) (divestiture not available); *Pretz* v. *Holstein Friesian Ass'n. of America*, 698 F.Supp. 1531, 1536-37 (D.Kan. 1988) (divestiture not available); *Mr. Frank, Inc.* v. *Waste Management, Inc.*, 591 F.Supp. 859, 865 (N.D.Ill. 1984) (divestiture not available).)

The commentators have noted this aberration in national antitrust policy and are virtually unanimous that the Ninth Circuit is wrong — that divestiture ought to be available to plaintiffs in section 16 cases. (Kintner, *Federal Antitrust Law,* V:40.32, n.963 (1984); P. Areeda, *Antitrust Analysis,* 57, n.139 (2d Ed. 1974); Note, *Availability of Divestiture in Private Litigation as a Remedy for Violation of Section 7 of the Clayton Act,* 49 Minn. L. Rev. 267 (1964); Peacock, *Private Divestiture Suits Under Section 16 of the Clayton Act,* 48 Tex. L. Rev. 54 (1969); Note, *The Use of Divestiture in Private Antitrust Suits,* 43 Geo.

Wash. L. Rev. 261 (1974); and Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief,* 19 Pac. L. J. 143 (1987).)

Without action by this court, California must proceed to trial deprived of even the opportunity to seek the remedy this Court has repeatedly recognized " . . . should always be in the forefront of a court's mind when a violation of § 7 has been found," (*United States* v. *E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 331 (1961); *Schine Chain Theaters* v. *United States*, 334 U.S. 110, 128 (1948),) while plaintiffs in the First, Second, Third and Fifth Circuits face no such handicap. This disparity results simply from the geographic location of the target firm, a fortuity which should play no role in our national antitrust enforcement scheme.

Because the decision below creates such grave risks to California consumers from an issue affecting enforcement of the nation's antitrust laws about which the circuit courts are in conflict, petitioner respectfully submits that resolution of that conflict deserves the attention of this Court now. (Rule 17.1 (a), Rules of the Supreme Court of the United States.)

II.

THE NINTH CIRCUIT'S NO-DIVESTITURE RULE CONFLICTS WITH THE LANGUAGE, HISTORY, AND PURPOSE OF THE CLAYTON ACT AND UNDERMINES THE COURTS' INHERENT EQUITABLE POWERS

A. Section 16 Contains No Limitation On Available Relief

Section 16 of the Clayton Act, 15 U.S.C. section 26, provides in part:

> "Any person . . . shall be entitled to . . . injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws, including [section 7 of the Clayton Act], when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . "

"[T]he statute states no restrictions or exceptions to the forms of injunctive relief a private plaintiff may seek, or that a court may order" (*CIA Petrolera Caribe* v. *ARCO Caribbean, Inc., supra,* 754 F.2d 404, 416) to remedy violations of section 7 of the Clayton Act.

An injunction mandating the divestiture of assets acquired in violation of section 7, is certainly within the plain meaning of "injunctive relief" in section 16. "Unless a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." (*Brown* v. *Swann,* 10 Pet. 497, 503 [9 L. Ed. 508].)

B. The Legislative History of Section 16 Does Not Justify the Ninth Circuit's No-Divestiture Rule

In *CIA Petrolera Caribe, Inc.* v. *ARCO Caribbean, Inc., supra,* the First Circuit held that divestiture is injunctive relief available under section 16 and reversed a district court's grant of summary judgment dismissing a section 7 action based on the supposed unavailability of the divestiture remedy sought by the plaintiff. (754 F.2d at pp. 406, 413-430.) The First Circuit thoroughly examined the historical underpinnings of *IT&T* and found no basis for the Ninth Circuit's conclusion that the legislative history of section 16 compels the conclusion that Congress did not intend to permit private parties to secure divestiture under section 16 of the Clayton Act. (*Ibid.*) To the contrary, the First Circuit points to substantial evidence within that history *supporting* the availability of divestiture. (754 F.2d at pp. 422-26.)

More importantly in light of this Court's requirement of "a clear and valid legislative command" restricting the equity powers of district courts (*Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 313, 102 S.Ct 1798, 1803, 72 L.Ed.2d 91 (1982)) the First Circuit concludes that:

> "Although we have no way of definitively determining the congressional intent in passing § 16, there remains at least one sure guidepost: when Congress uses broad generalized language in a remedial statute, and that language is not contravened by authoritative legislative history, a court should interpret the provision generously so as to effectuate the important congressional goals. . . . The attempt to restrict "injunctive relief" to its putative meaning in 1914 collides head-on with this principle and must be rejected.

"Our reliance on this principle of statutory construction here is especially appropriate because the Sherman and Clayton Acts were drafted in broad terms to defeat an evil that Congress knew could take many forms. The explanations of record offered by committee and conference members were equally broad and general, stressing the purpose for which the section had been drafted. On the floor of neither the Senate nor the House, nor in any committee report, is there a single reference to any limitations or restrictions on § 16 'injunctive relief' which would negate the plain language or the sponsors' broad explanation of the provision. Accordingly, *we decline to engraft judicially a per se limitation on § 16 forbidding an order for divestiture.*" (754 F.2d at pp. 428-29 (emphasis added).)

C. The No-Divestiture Rule Fundamentally Conflicts With the Policies of the Clayton Act

1. The Ninth Circuit Reads Section 16 to Establish a Right Without The Most Effective Remedy

The Ninth Circuit's continuing enforcement of such an unwarranted judicial restriction on section 16 of the Clayton Act cannot be justified by any defensible policy of antitrust enforcement. As Areeda and Turner have noted:

"To hold a merger unlawful in a private suit while refusing to decree the undoing of that merger makes little sense in terms of antitrust policy.

"Fortunately, other courts have indicated, correctly, that divestiture is available in a private suit challenging unlawful mergers. The existence of power to order divestiture is distinct from the appropriateness of decreeing it in a particular case. Nevertheless, *divestiture is the normal and usual remedy against an unlawful merger, whether sued by the government or by a private plaintiff.*" (2 P. Areeda & D. Turner, *Antitrust Law* § 328b (1978) (emphasis added).)

2. A Remedy That Depends on Aggrieved Parties Obtaining Judicial Relief Faster Than Investors Can Buy Stock is No Remedy at All

It is no answer to say that there is a private remedy under section 16 — that the plaintiff simply has to move faster than California did in this case.

The availability of effective relief from violations of section 7 cannot depend on plaintiffs winning that footrace. This Court knows well the size and complexity of section 7 cases. To secure an interlocutory injunction presumably requires a plaintiff to conduct the market studies and amass the other evidence necessary to show a prima facie violation of section 7. Merging firms intent on avoiding meaningful antitrust review can certainly purchase stock faster than persons outside the affected industry can make such a showing.

That fact is amply demonstrated by this case. The District Court found that California "conducted this investigation as swiftly as was responsibly possible." (697 F.Supp. at p. 1135.) The Circuit Court simply ignored this finding.

The Ninth Circuit's reading of section 16 encourages merging parties to structure their deals around an early exchange of stock to frustrate private enforcement of the Clayton Act. No plausible Congressional purpose is served by such a rule.

3. The Ninth Circuit Rule Compels Section 16 Plaintiffs to Disregard the FTC's Review Procedures

The import of the no-divestiture rule for victims of section 7 violations in the Ninth Circuit is that they participate in the "premerger" review procedures under the H-S-R at their peril.

The District Court found that California acted "responsibly" in conducting its investigation with the intent "to have the procedures contemplated by the Hart-Scott-Rodino Act run their course." (697 F.Supp. at p. 1135.) The Circuit Court, however, says "California could have sued several months earlier" (872 F.2d at p. 846) — nowhere acknowledging the necessary implication: that California should have disregarded the pending FTC review.

No sound policy is served by an interpretation of section 16 that requires aggrieved parties to initiate lawsuits in parallel with FTC proceedings.

4. The No-Divestiture Rule Ignores This Court's Teachings on the Broad Effect Section 16 is to be Given

Protecting consumers and the nation's economy from the threat posed by firms amassing undue market power is perhaps the paramount concern that the Congress was addressing in enacting the antitrust laws, particularly section 7 of the Clayton Act. (*Brown Shoe Co.* v. *United States,* 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *United States* v. *General Dynamics Corp.,* 415 U.S. 486, 496-97, 39 L.Ed.2d 530, 541-42, 94 S.Ct. 1186 (1974).) The Court has recognized the importance of the public interests at stake in section 7 cases by emphasizing strict

adherence to its oft stated command that equitable principles must yield effective results:

> "The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. ***But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests.*** *(United States* v. *Du Pont De Nemours & Co., supra,* 366 U.S. at p. 326 (emphasis added).)

This Court's historic insistence on preserving the full panoply of equitable powers available to district courts has found clear expression in decisions interpreting section 16 of the Clayton Act. In *Zenith Radio Corp.* v. *Hazeltine Research Inc.,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969), the Court noted:

> "Section 16 should be construed and applied . . . with the knowledge that the remedy it affords, like other equitable remedies, is flexible and capable of nice 'adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' . . . Its availability should be 'conditioned by the necessities of the public interest which the Congress has sought to protect.' " (395 U.S. at pp. 130-31.)

The decision below collides head-on with these principles by depriving petitioner of the remedy this Court has long recognized is the most effective method of dealing with unlawful mergers — divestiture. (*United States* v. *E.I. Du Pont De Nemours & Co., supra,* 366 U.S. at 330-331.) Because the Ninth Circuit's decision affects an

important question of federal law which remains unsettled after more than a quarter century, certiorari should be granted so that this Court can determine the availability of divestiture under section 16 of the Clayton Act. (Rule 17.1 (c), Rules of the United States Supreme Court.)

5. The Ninth Circuit's Rule Undermines Congressional Policy Favoring Private Enforcement of the Antitrust Laws

This Court has long recognized the important place Congress intended private enforcement to occupy under the antitrust laws. (E.g., *Zenith Radio Corp.* v. *Hazeltine,* 395 U.S. at pp. 130-31; *United States* v. *Borden Co.,* 347 U.S. 514, 518 (1954).) The Ninth Circuit's reading of section 16 simply ignores that principle — at a time when the principle has become even more important.

Since the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, was passed in 1978, merger activity has nearly tripled.[2] Dur-

[2]In 1979, 859 H-S-R premerger notifications were given to the federal enforcement agencies. (*Oversight And Authorization Hearings Into the Policies and Enforcement Record Of The Antitrust Division (DOJ) Before the Subcomm. on Monopolies and Commercial Law of the House Comm. of the Judiciary,* 100 Cong. 1st & 2d Sess. 355, 383, App. 1 (1989) (hereafter *"House Oversight Hearings"*). None was valued at more than one billion dollars. (D.W. Barnes, *Federal and State Philosophies in the Antitrust Law of Mergers,* 56 Geo. Wash. L. Rev. 263, 264 (1988) (hereafter, *"Federal and State Philosophies"*.) Of these, the Department of Justice initiated actions challenging 9, or approximately 1%. (*House Oversight Hearings* at p. 383.)

By 1986, the number of premerger notifications had risen to 1,949. (*House Oversight Hearings* at p. 383) Of these, 34 exceeded one billion dollars in value having a total value in excess of $68 billion. (Barnes, *Federal and State Philosophies* at p. 264.) The Department of Justice initiated actions challenging only 4, or .2%. (*House Oversight Hearings* at p. 383.) The FTC's enforcement efforts were no greater. (Barnes, *Federal and State Philosphies* at p. 264.)

ing the same time, the number of cases challenging mergers brought by the Federal antitrust enforcement agencies actually suffered a five-fold decrease. (*House Oversight Hearings* at 383; Barnes, *Federal and State Philosophies* at p. 265.) Between 1980 and 1986, the Antitrust Division's budget allocation declined by 30% in constant dollars, (*House Oversight Hearings* at p. 145), while the number of attorneys declined by 40%. *(Ibid.)* Thus, while the need for vigilant private enforcement of section 7 is increasing, the Ninth Circuit has eviscerated the ability of private parties to carry out the important role envisioned by Congress in enacting section 16.

III.

WITHOUT IMMEDIATE REVIEW BY THIS COURT CALIFORNIA'S RIGHT TO THE MOST EFFECTIVE ANTITRUST RELIEF WILL BE FORECLOSED

Divestiture is clearly the remedy of choice for section 7 violations. (*United States* v. *E.I. Du Pont De Nemours & Co.,* 366 U.S. *supra,* at p. 330-331 (1961); *Schine Chain Theaters* v. *United States,* 334 U.S. 110, 128 (1948).) The District Court below found that integration of the Alpha Beta and Lucky supermarket chains would "... disable the acquired chain from operating independently of the parent." (697 F.Supp. at p. 1134.) The Ninth Circuit affirmed the District Court's finding that as a result of this merger "citizens of California will be substantially and irreparably harmed." (697 F.Supp. at p. 1135, *aff'd,* 872 F.2d at p. 844.) Unless the Court reverses the Ninth Circuit's order now, California will be unable to secure

relief dismantling the unlawful combination of Alpha Beta and Lucky, if it prevails at trial.

California will be left with the prospect of pursuing unknown remedies aimed only at "the symptoms" (872 F.2d at p. 846) of the unlawful acquisition with no evidence that any such remedies will satisfy the Ninth Circuit's equally unwarranted stricture against "indirect divestiture" (872 F.2d at p. 845), or restore competition to the retail grocery market. California consumers face the proven prospect of losing several hundred million dollars annually in the form of higher prices (ER 1044) and the uncertainty associated with multiple treble-damage actions as the only means of recovering for that injury. (Comment, *Section 16 of the Clayton Act: Divestiture an Intended Type of Injunctive Relief,* 19 Pac. L.J. 143, 167-69.)

Experience with relief less than full divestiture of the acquired firm in the government's section 7 cases has proven how difficult it is to secure meaningful relief against unlawful mergers. (Rogowsky, *The Economic Effectiveness of Section 7 Relief,* 31 Antitrust Bull. 187 (1986); Elzinga, *The Antimerger Law: Pyrrhic Victories?,* 12 J. Law & Econ. 43 (1969); Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust,* 27 Indiana L.J. 1 (1951).) This Court's own experience bears out these difficulties. In *United States* v. *United Shoe Machinery Corp.*, 110 F.Supp. 296 (D.Mass 1953), *aff'd. per curiam* 347 U.S. 521 (1954), the Court affirmed a district court decree directing relief short of the divestiture the government had requested. Ten years later, the district court again rejected the government's request for divestiture after the government concluded that the original decree had not restored competition to the market affected by the defendant's unlawful behavior. (*United States* v. *United Shoe Mach. Corp.*, 266 F.Supp 328 (D.Mass 1967).) This Court reversed and remanded to the District Court to reconsider the government's request for divestiture and directed it to enter a decree which would eliminate the effects of the defendant's monopoly forthwith. (*United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968).)

In *United States* v. *E.I Du Pont De Nemours & Co., supra,* 366 U.S. 316, the Court reversed a district court decree for failure to order divestiture of stock acquired in violation of section 7 of the Clayton Act and took the unusual step of directing a divestiture decree. (366 U.S. at p. 334.) The public interest in effective relief is no less demanding simply because California, rather than the federal government, brought this case. (*Zenith Radio Corp.* v. *Hazeltine,* 395 U.S. at pp. 130-31.)

Clearly, injunctive relief "directed only at the symptoms" of a section 7 violation cannot entirely eliminate the increased market power achieved by an illegal acquisition. (Rogowsky, *The Economic Effectiveness of Section 7 Relief,* 31 Antitrust Bull. 187 (1986).) At best, such relief would mitigate such effects after long periods of time. For example, an injunction barring opening of new stores in markets affected by the merger (see RT Sept. 16, 1988, at pp. 15-20), might reduce the concentration levels which the District Court found evidenced the section 7 violation (697 F.Supp at pp. 1130-31). However, such an injunction would take years to remedy the extreme levels of concentration found by the District Court (697 F.Supp. at p. 1130), and would do nothing to mitigate the unlawful market power which American Stores will have during the intervening years if it is allowed to integrate the Alpha Beta and Lucky supermarket chains. (Rogowsky, *Economic Effectiveness of Section 7 Relief,* 31 Antitrust Bull.

at p. 190.) That is why the District Court concluded that without the preliminary injunction it ordered, if "the merger is subsequently found to be unlawful, it would be extremely difficult, if at all possible, to remedy effectively the unlawful merger." (697 F.Supp. at p. 1134.)

Even between the time this case is remanded to the District Court and actually tried, substantial irreparable harm is likely to be inflicted on California's consumers. (697 F.Supp. at p. 1135.) In *Tasty Baking Co.* v. *Ralston Purina, Inc.*, 653 F.Supp. 1250, 1276-77 (E.D.Pa. 1987), similar considerations led the District Court to conclude both that divestiture was available under section 16 and that a preliminary injunction holding the acquired firm separate from the acquiring firm was an appropriate means of preserving the viability of the acquired firm for later divestiture should the plaintiff in that case ultimately prevail. The Court's reasoning in *Tasty Baking* applies with equal force here:

> "Any diminution in Drake's post-divestiture competitive power clearly will harm consumers irreparably, and plaintiffs claim and I agree, will harm Tasty irreparably. Simply put, Tasty is better positioned to compete with Hostess if Hostess faces strong competition (keeping prices fair) in others. A contrary conclusion would leave defendants free to swallow up a competitor, to digest it in part, and upon a court order, to regurgitate insubstantial remains. No such result is acceptable." (653 F.Supp. at p. 1277.)

Unless reversed, the Ninth Circuit's decision in this case will result in the immediate loss of one of the four largest supermarket chains currently competing in California. (697 F.Supp. at p. 1134.) That result is unacceptable and should be prevented by this Court's grant of certiorari.

CONCLUSION

The Ninth Circuit's decision that divestiture is not a remedy available to the District Court cannot be justified by any policy underlying the antitrust laws or this Court's equity jurisprudence. As the First Circuit showed in *Petrolera Caribe*, it also cannot be justified by reference to the legislative history of section 16 of the Clayton Act. Resolution of the conflict between the circuits by this Court's reversal of the decision below is the only sure means of preventing the vast, irreparable injury this merger threatens to inflict on California's citizens. Accordingly, California respectfully submits that a writ of certiorari issue to the Ninth Circuit and that its decision overturning the preliminary injunction ordered by the District Court be reversed.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney
General
MICHAEL J. STRUMWASSER
Special Assistant Attorney
General
SANFORD N. GRUSKIN
Assistant Attorney General
*H. CHESTER HORN, JR.
LAWRENCE R. TAPPER
ERNEST MARTINEZ
Deputy Attorneys General

*Counsel of Record

APPENDIX A

STATE OF CALIFORNIA,
Plaintiff-Appellee,

v.

AMERICAN STORES CO.; ALPHA BETA ACQUISITION CORP.; LUCKY STORES, INC.,
Defendants-Appellants.

No. 88-6467.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 8, 1988.

Decided March 31, 1989.

Grocery retailer named as defendant in antitrust action by state of California arising out of proposed merger of supermarket chains appealed from orders of the United States District Court for the Central District of California, David V. Kenyon, J., 697 F.Supp. 1125, denying its motion to dismiss action and granting State's motion for preliminary injunction. The Court of Appeals, Wallace, Circuit Judge, held that: (1) statistical evidence of pre and postmerger market share and market concentration, along with expert testimony, supported finding that State made prima facie showing of § 7 of Clayton Act, and retailer's evidence of absence of meaningful barriers to market entry could be found not to have rebutted that showing; (2) State was entitled to preliminary injunction based on showing that it was likely to succeed on merits of its claim that merger might substantially lessen competition in relevant product market and possibility of irrepa-

rable harm if injunction were not granted; and (3) FTC consent order did not undo legal effect of merger, and preliminary injunction could not be used by State to obtain indirect divestiture and was thus overly broad.

Affirmed in part and reversed and remanded in part.

1. Federal Courts 767

Review by Court of Appeals of order granting preliminary injunction is limited.

2. Injunction 138.21

Degree of irreparable harm that must be shown in order to obtain preliminary injunction increases as probability of success on the merits decreases.

3. Monopolies 20(2)

Merger may substantially lessen competition by permitting one firm to control undue share of relevant market and by significantly increasing concentration of firms in that market. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

4. Monopolies 20(6)

District court could limit relevant product market to "supermarkets" — full line grocery stores with more than 10,000 square feet — rather than all retailers of grocery products, in assessing anticompetitive effect of merger of supermarket chains for purposes of motion for preliminary injunction. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

See publication Words and Phrases for other judicial constructions and definitions.

5. Monopolies 20(4)

Relevant indicia of merger's effects on competition are market shares of merging firms, degree of concentration in market, and degree to which that concentration is increased by merger. Clayton Act, § 1 et seq., as amended, 15 U.S.C.A. § 12 et seq.

6. Monopolies 24(3)

Statistical evidence of pre and postmerger market share and market concentration, along with expert testimony, supported finding that state of California established prima facie violation of § 7 of Clayton Act in connection with merger of supermarket chains. Clayton Act, § 7, as amended, 15 U.S.C.A. § 18.

7. Monopolies 20(2)

Absence of entry barriers into market contrains anticompetitive conduct, irrespective of market's degree of concentration. Clayton Act, § 7, as amended, 15 U.S.C.A § 18.

8. Monopolies 24(13)

Grocery retailer could be found not to have rebutted State's prima facie showing of antitrust violation from merger of supermarket chains through evidence of absence of meaningful entry barriers into retail grocery market; in evaluating absence of entry barriers, district court had appropriately considered amount of capital necessary to become competitor in market, availability of capital, availability of technological advancements, number and size of customers or firms already operating in market, and structure and nature of industry. Clayton Act, § 7, as amended, 15 U.S.C.A § 18.

9. Monopolies 24(16)

Federal Trade Commission consent order, requiring grocery retailer to divest itself of 24 of its 54 supermarkets in Northern California and to agree to operate chain with which its chain was merging separately and to refrain from integrating companies' assets until conditions of consent order were satisfied, did not absolve all antitrust concerns in suit by state of California arising out of merger of chains; thus, State could be found likely to succeed on merits for purposes of its request for preliminary injunction. Clayton Act, § 7, as amended, 15 U.S.C.A § 18.

10. Monopolies 24(15)

State of California was entitled to preliminary injunction against supermarket chain merger, based on showing that it was likely to succeed on merits of its claim that effect of merger might be to substantially lessen competition in relevant product market and possibility of irreparable harm if injunction were not granted. Clayton Act, §§ 7, 16, as amended, 15 U.S.C.A. §§ 18, 26.

11. Monopolies 24(15)

Supermarket chains had merged and state of California could not obtain indirect divestiture of those chains by way of preliminary injunction, which was thus overly broad; Federal Trade Commission consent order merely forestalled complete integration of those chains and did not undo legal effect of merger under applicable Delaware law, and State could not even temporarily bootstrap itself into divestiture remedy to which it was otherwise not entitled by virtue of consent order designed to protect FTC's rights. Clayton Act, § 16, as amended, 15 U.S.C.A. § 26; 8 Del.C. §§ 251-263.

12. Injunction 157

Preliminary injunctive relief should be narrowly tailored and should be no more burdensome than necessary to preserve plaintiff's ability to obtain complete permanent relief to which it is entitled.

13. Federal Civil Procedure 2533
Federal Courts 557

Motion to dismiss for failure to state claim upon which relief could be granted would be treated as summary judgment motion in light of district court's consideration of voluminous materials outside pleadings that were submitted by movant, and denial of that motion was thus not appealable. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Frank Rothman, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, Cal., for defendants-appellants.

H. Chester Horn, Jr., Deputy Atty. Gen., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before WALLACE, POOLE and O'SCANNLAIN, Circuit Judges.

WALLACE, Circuit Judge:

American Stores Company (American Stores), one of the nation's largest grocery retailers, appeals from orders denying its motion to dismiss and granting a motion for preliminary injunction in favor of the State of California. American Stores acquired 100% of the stock of Lucky Stores, Inc. (Lucky), one of American Store's major competitors in California. Approximately three months later, the California Attorney General initiated this anti-

trust action, both on his own behalf and in his capacity as *parens patriae* of the consumers of the state, challenging American Stores's acquisition of Lucky as a violation of section 7 of the Clayton Act, 15 U.S.C. § 18, section 1 of the Sherman Act, 15 U.S.C. § 1, and California's Cartwright and Unfair Competition Acts, Cal.Bus. & Prof. Code §§ 16700-16761 and 17200-17208 (West 1987 & Supp.1989). The district court granted California's request for preliminary relief and ordered American Stores to operate Lucky separately and refrain from integrating the two companies' assets. *California v. American Stores Co.*, 697 F.Supp. 1125, 1135-36 (C.D.Cal. 1988) (*American Stores*). We have jurisdiction pursuant to 28 U.S.C. § 1292(a)(1). We affirm in part and reverse and remand in part.

I

American Stores is California's fourth largest retail grocery chain, operating 252 "Alpha Beta" and "Skaggs Alpha Beta" (collectively Alpha Beta) supermarkets throughout the state. *Id.* at 1127. Lucky is the state's largest chain, operating 340 "Lucky Stores" and "Lucky Food Basket" supermarkets. *Id.* The acquisition began on March 21, 1988, when American Stores initiated a hostile takeover bid for all of Lucky's outstanding shares. Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18a, American Stores notified the Federal Trade Commission (FTC) of its intentions. On May 23, 1988, American Stores increased its tender offer and Lucky's board approved the merger.

On May 31, 1988, the FTC suspended the merger by filing an administrative complaint charging that American Stores's acquisition of Lucky would violate section 7 of the Clayton Act and section 5 of the Federal Trade

Commission Act, 15 U.S.C. § 45. The FTC simultaneously filed a proposed consent order settling its charges on the condition that American Stores comply with certain demands. For example, the consent order required American Stores to divest itself of 24 of its 54 Alpha Beta supermarkets in Northern California. The consent order also contained an Agreement to Hold Separate (Hold Separate), whereby American Stores would be required to operate Lucky separately and to refrain from integrating the two companies' assets. The Hold Separate was to continue until American Stores satisfied all of the consent order's conditions.

American Stores agreed to the consent order, proceeded with the merger under its conditions, and by June 9, 1988, had acquired 100% of Lucky's outstanding stock. American Stores paid an aggregate price in excess of $2.5 billion. On September 1, 1988, California initiated this action, requesting as relief a Hold Separate similar to that of the FTC, rescission, divestiture, injunctive and declaratory relief, and "such other and further relief as the case requires."

II

[1] Our review of an order granting a preliminary injunction is limited. *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 673 (9th Cir. 1988) (*Caribbean Marine*); *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985) (*Oakland Tribune*); *Sports Form, Inc. v. United Press International,,* 686 F.2d 750, 752 (9th Cir. 1982) (*Sports Form*). "The grant or denial of a motion for a preliminary injunction lies within the discretion of the district court." *Zepeda v. United States Immigration and Naturalization Service*, 753 F.2d 719, 724 (9th Cir. 1983) (*Zepeda*); *United States v.*

Odessa Union Warehouse Co-op, 833 F.2d 172, 174 (9th Cir. 1987) (*Odessa Union*); *Sports Form*, 686 F.2d at 752.

> When reviewing an order issuing a preliminary injunction, an appellate court must determine whether the district court applied the proper legal standard in issuing the injunction and whether it abused its discretion in applying that standard. An injunction may also be set aside if the district court misapprehended the law on its preliminary assessment of the merits, or premised its conclusions on clearly erroneous findings of fact. Absent one of these errors, the district court's decision will not be reversed merely because the appellate court would have arrived at a different result if it had initially applied the law to the facts of the case.

Caribbean Marine, 844 F.2d at 673 (citations omitted).

III

[2] We now consider whether the district court abused its discretion in granting California's motion for a preliminary injunction. To obtain a preliminary injunction, California "must show either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor." *Odessa Union*, 833 F.2d at 174 (citation omitted); *Oakland Tribune*, 762 F.2d at 1376; *Sports Form*, 686 F.2d at 753. These formulations are not different tests but represent two points on a continuum in which the degree of irreparable harm that must be shown increases as the probability of success on the merits decreases. *Odessa Union*, 833 F.2d at 174; *Arcamuzi v. Continental Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987); *Oakland Tribune*, 762 F.2d at 1376. The district court's order granting the preliminary injunction is reversible if the court did not employ these legal standards. *Zepeda*, 753 F.2d at 724.

[3] The district court found that California had shown a likelihood of success on the merits of its Clayton Act claim. To establish a prima facie violation of section 7 of the Clayton Act, California must prove that the effect of American Stores's acquisition of Lucky's stock "may be substantially to lessen competition." 15 U.S.C. § 18. A merger may substantially lessen competition by permitting one firm to control an undue share of the relevant market and by significantly increasing the concentration of firms in that market. *United States v. Philadelphia National Bank*, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963) (*Philadelphia National Bank*).

A.

American Stores argues that the district court improperly defined the relevant product market and thus erred in finding that the merger may substantially lessen competition. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510 (1962) (*Brown Shoe*) (footnote omitted). Where an increase in the price of one product leads to an increase in demand for another, both products should be included in the relevant product market. *E.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 400, 76 S.Ct. 994, 1009-1010, 100 L.Ed. 1264 (1956).

[4] American Stores, though itself a supermarket chain, asserts that the relevant product market should not be limited to supermarkets. Rather, the market should include all retailers of grocery products, such as conve-

nience stores, "mom and pop" grocery stores, gasoline stations, delis, bakeries, and limited assortment warehouse hyper-stores. Consumers, according to American Stores, readily engage in demand substitution between different types of grocery retailers.

The district court accepted California's view that the relevant product market was limited to supermarkets — full-line grocery stores with more than 10,000 square feet. *American Stores,* 697 F.Supp. at 1129. The district court reasoned that only such supermarkets compete for consumers' periodic grocery shopping needs. *Id.* California presented expert testimony supporting this definition and offered American Stores's own internal marketing documents indicating that American Stores considers other supermarkets to be its only competitors.

Were we to evaluate independently the evidence of the relevant product market, we might reach a different conclusion. But that ultimate determination must await our review of any subsequent permanent injunction. "Because our review of the law applied by the district court is so limited and because the fully developed factual record may be materially different from that initially before the district court, our disposition of appeals from most preliminary injunctions provides little guidance on the appropriate resolution of the merits." *Zepeda,* 753 F.2d at 724. Indeed, after all evidence is presented at trial, the fact finder may come to a different view of the market. But for now, we are restricted to our limited review. The record shows that the district court, in making its preliminary assessment of the merits, understood the law. American Stores merely disagrees with its application. The facts upon which the district court relied were not clearly erroneous. They were supported by expert testimony. Confronted with two competing theories of the market,

both supported by evidence, the district court exercised its judgment concerning the cross-elasticity of demand. At this stage, we do not resolve conflicts in the evidence. *FTC v. Warner Communications Inc.,* 742 F.2d 1156, 1164 (9th Cir. 1984) (*Warner Communications*). We therefore conclude that the district court did not abuse its discretion in limiting the product market to the described supermarkets.

B.

[5] American Stores argues that the district court erred in its analysis of the merger's effects on competition. Relevant indicia of competitive effects are (1) the market shares of the merging firms, (2) the degree of concentration in the market, and (3) the degree to which that concentration is increased by the merger. *See United States v. Von's Grocery Co.,* 384 U.S. 270, 277-78, 86 S.Ct. 1478, 1482, 16 L.Ed.2d 555 (1966); *Philadelphia National Bank,* 374 U.S. at 363-65, 83 S.Ct. at 1741-43; *Brown Shoe,* 370 U.S. at 322 n. 38, 82 S.Ct. at 1522 n. 38. Statistics that indicate excessive post-merger market share and market concentration create a presumption that the merger violates the Clayton Act. *Philadelphia National Bank,* 374 U.S. at 363, 83 S.Ct. at 1741.

[6] Both American Stores and California submitted considerable statistical evidence and pre- and post-merger market share and market concentration. *American Stores,* 697 F.Supp. at 1130. The district court, using the geographic market defined by American Stores, found American Stores's average post-merger market share to be 24%, with a range from 15% to 38% in individual areas. Two-firm concentration would increase from a pre-merger average of 51% to a post-merger average of 56% and four-firm concentration would increase from an aver-

age of 73% to 79%. *Id.* The district court also used an additional statistical method, the Herfindahl-Herschman Index (HHI), to evaluate the effects of the merger. *Id.* The court found the the HHI indicated a highly concentrated post-merger market. *Id.* Finally, the court considered statistical data of historical market share trends. American Stores offered data which it contended reflected a decrease in market concentration. California offered more extensive evidence showing an increase in concentration. *Id.* at 1131.

The district court found that the statistical evidence of market share, market concentration, and market concentration trends created a presumption that American Stores's acquisition of Lucky would lessen competition substantially. *Id.* We cannot conclude that the statistics upon which the district court relied were clearly erroneous. All of the statistics were supported by expert testimony. Likewise, the district court did not misapprehend the law in its preliminary assessment of the merits. The district court understood the legal definition of a highly concentrated market and the types of evidence that are probative of market concentration. The district court's evaluation of the statistical evidence required an exercise of judgment. We therefore hold that the district court did not abuse its discretion in finding that California had established a prima facie violation of section 7 of the Clayton Act.

American Stores can rebut the district court's determination of a prima facie violation of section 7 through evidence demonstrating that statistics on market share, market concentration, and market concentration trends portray inaccurately the merger's probable effects on competition. *See United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120, 95 S.Ct. 2099, 2118, 45

L.Ed.2d 41 (1975); *United States v. General Dynamics Corp.*, 415 U.S. 486, 496-504, 94 S.Ct. 1186, 1193-1197, 39 L.Ed.2d 530 (1974). The burden to rebut the presumption of illegality is on American Stores. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 631, 94 S.Ct. 2856, 2874, 41 L.Ed.2d 978 (1974).

[7] An absence of entry barriers into a market constrains anticompetitive conduct, irrespective of the market's degree of concentration. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532-33, 93 S.Ct. 1096, 1100-01, 35 L.Ed.2d 475 (1973) (finding that the potential for Falstaff brewer to enter the market might constrain brewers in Northeast to maintain competitive prices). American Stores argues that it rebutted the presumption of illegality by demonstrating an absence of meaningful entry barriers into the retail grocery market. The district court found that American Stores had not satisfied its burden. *American Stores*, 697 F. Supp. at 1133. Although American Stores makes a compelling case for easy entry into the market, we can reverse the district court only if its finding was clearly erroneous.

[8] To show an absence of entry barriers, American Stores offered evidence of two recent entrants into the retail grocery market. The first, Market Wholesale Grocery Co., had plans to purchase 15 stores that Alpha Beta and Lucky were required to divest pursuant to the FTC's consent order. *Id.* at 1132. The district court found that this entry, based on the events that triggered it, was not probative of an absence of barriers. *Id.* The second recent entrant, Richard London, testified that he had opened four "Major Market" stores in the past two years. *Id.* The district court found that London's stores were not part of the relevant product market. *Id.* American Stores also offered the declarations of William Christy and Donald

Kaplan, both industry participants, who testified that entry into the retail grocery market is not difficult. California provided expert testimony to the effect that entry barriers do exist in the grocery market. California's expert identified these barriers as: (1) store economies of scale; (2) multi-store economies of scale, such as advertising costs; (3) capital costs and risk; (4) the difficulty of obtaining desirable store sites; and (5) strategic behavior by incumbent chains such as zone pricing and geographic preemption.

The district court, in evaluating the absence of entry barriers, considered the following factors: (1) amount of capital necessary to become a competitor in the market; (2) availability of capital; (3) availability of technological advancements; (4) number and size of customers or firms already operating in the market; and (5) structure and nature of the industry. *Id.* We have recognized that consideration of these factors is appropriate. *See Warner Communications,* 742 F.2d at 1163-64. Thus, the district court did not misapprehend the law. We do not find as a matter of law that entry into the market for retail supermarkets is difficult. Rather, we recognize that both parties offered competing evidence. We must therefore conclude that the district court's holding that American Stores did not satisfy its burden of rebutting California's prima facie showing of a violation of section 7 was not an abuse of discretion.

C.

[9] Finally, American Stores argues that the district court's conclusion of California's likelihood of success on the merits was in error because the FTC's consent order resolved all antitrust concerns. At a minimum, American Stores contends, the FTC's findings should be afforded

considerable deference. For this proposition, American Stores relies on *Lieberman v. FTC,* 771 F.2d 32 (2d Cir.1985) (*Lieberman*), and *Mattox v. FTC,* 752 F.2d 116 (5th Cir.1985) (*Mattox*).

Neither *Lieberman* nor *Mattox* discussed the appropriate degree of deference that a federal court should afford an FTC consent order when the FTC is not a party to the action. Rather, these cases addressed a narrow issue of statutory interpretation, namely, whether section 7A(h) of the Clayton Act prohibits the FTC from providing to state attorneys general premerger information filed pursuant to the Hart-Scott-Rodino Act. *Lieberman,* 771 F.2d at 33; *Mattox,* 752 F.2d at 117. Thus, *Lieberman* and *Mattox* provide no support for American Stores's argument.

More analogous is *United States v. Borden Co.,* 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954), where the Supreme Court examined the legal effect of a consent decree on a subsequent antitrust action brought by the United States. Holding that the prior consent decree did not bar the action, the Court explained that "private and public [Clayton Act] actions were designed to be cumulative, not mutually exclusive." *Id.* at 518, 74 S.Ct. at 706. The Court reasoned that private and public interests in antitrust actions may not necessarily coincide. *Id.* at 518-20, 74 S.Ct. at 706-07. We think this reasoning applies here. California may have different interests than does the FTC in protecting its citizens from antitrust violations. *See Arvin Industries, Inc. v. Maremont Corp.,* 1973 Trade Cas. (CCH) § 74,416, 1973 WL 784 (S.D.Ind.1973). We do not hold that federal courts should give no deference to FTC consent orders. Rather, we hold that in this case the district court did not abuse its discretion in finding a likelihood of success on the merits.

IV

[10] As we pointed out above, California may obtain a preliminary injunction by showing both a likelihood of success on the merits and the possibility of irreparable harm. *Odessa Union,* 833 F.2d at 174; *Oakland Tribune,* 762 F.2d at 1376; *Sports Form,* 686 F.2d at 753. The district court decided that the irreparable harm that would result absent an injunction is the lessening of competition. *American Stores,* 697 F.Supp. at 1134. We agree with the district court that this is precisely the kind of irreparable injury that injunctive relief under section 16 of the Clayton Act was intended to prevent. *See* 15 U.S.C. § 26; *United States v. BNS, Inc.,* 858 F.2d 456, 466 (9th Cir.1988) (*BNS*). Indeed, the district court's determination of irreparable harm follows naturally from its holding of likelihood of success on the merits. We hold that the district court did not abuse its discretion in granting California's motion for a preliminary injunction. Because California's showing of likelihood of success on merits and possibility of irreparable harm satisfies the prerequisites for granting a preliminary injunction, we need not address American Stores's arguments concerning the balance of hardships.

V

Section 16 of the Clayton Act allows any party to sue for injunctive relief against threatened loss or damage resulting from a violation of the antitrust laws. 15 U.S.C. § 26. American Stores contends that the relief that the district court ordered in its preliminary injunction is not available to California under section 16 of the Clayton Act. The district court's order required the following of American Stores:

1. Take all steps necessary to operate American Stores Company, Alpha Beta Acquisition Corporation and their subsidiaries, divisions and groups (collectively "American Stores"), independently of the assets and businesses of Lucky Stores, Inc. ("Lucky") in the State of California.

2. Refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988, other than in the ordinary course of business, and shall refrain from taking any further steps to merge or integrate the assets and businesses of American Stores' Alpha Beta California operations with those of Lucky's California operations or any further steps to merge or integrate the assets and businesses of Lucky's California operations with those of American Stores' Alpha Beta California operations.

American Stores, 697 F.Supp. at 1136. American Stores argues that this order requires divestiture, rescission, or dissolution — forms of relief not available in a permanent injunction to private parties under section 16. According to American Stores, because a preliminary injunction is designed solely to preserve the ability to award permanent relief, the district court abused its discretion by ordering in a preliminary injunction relief that it cannot award in a permanent injunction.

In *International Telephone & Telegraph Corp. v. General Telephone & Electronics Corp.,* 518 F.2d 913, 920 (9th Cir.1975) (*IT & T*), we held "that divestiture is not an available remedy in private actions under § 16 of the Clayton Act." *See also Bosse v. Crowell Collier & MacMillan,* 565 F.2d 602, 607 (9th Cir.1977) (*Bosse*) ("divestiture is not an available remedy in private actions [under section 16]"); *Calnetics Corp. v. Volkswagen of America,*

Inc., 532 F.2d 674, 692 (9th Cir.) (*Calnetics*) ("remedy of divestiture is not available to private plaintiffs in antitrust suits"), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976). We also held in *IT & T* that section 16 does not permit indirect divestiture, that is, an injunction which on its face does not order divestiture but which has the same effect. *IT & T*, 518 F.2d at 924. For example, we observed that an injunction barring a corporation from voting the stock of, or exercising any control over its subsidiaries, or from obtaining representation on the board of directors of an acquired company, is in effect a directed divestiture. Such an injunction, therefore, could not be ordered under section 16. *Id.*

[11] The district court's injunction on its face did not order divestiture. Rather, similar to the FTC's consent order, it required a Hold Separate preventing the integration of two wholly-owned subsidiaries of a common parent. American Stores insists that the district court's Hold Separate is divestiture by another name. California, on the other hand, asserts that the district court's order merely maintained the status quo. On the date the district court entered the preliminary injunction, American Stores, pursuant to the FTC's consent order, was operating its Alpha Beta and Lucky subsidiaries separately. Thus, California argues, the injunction did not order the type of retrospective relief that *IT & T* held to be unavailable under the Clayton Act.

The district court reasoned that the Hold Separate could be granted because Lucky and Alpha Beta's operations had yet to be integrated completely due to the existence of the FTC's consent order. The district court apparently believed that the merger had not been consummated. Thus, the preliminary injunction, in the district

court's view, did not order divestiture or dissolution. *American Stores*, 697 F.Supp. at 1133-34.

We conclude that the district court misapprehended the law of divestiture. Our decisions in *IT & T*, *Bosse*, and *Calnetics* are clear that divestiture, whether direct or indirect, is not an available form of relief under section 16 for a private party such as California. The preliminary injunction in this case prevents American Stores from exercising an important form of control over its wholly-owned subsidiaries: it requires Lucky and Alpha Beta, though both owned by American Stores, to act as competitors. In other words, these stores must operate as if Lucky had never been acquired by American Stores at all. Such an injunction requires indirect divestiture. *See IT & T*, 518 F.2d at 924.

The district court also misapprehended the law governing corporate mergers in concluding that the merger had not been completed. Prior to the issuance of the injunction, American Stores had acquired all of the outstanding stock of Lucky. Under Delaware law, applicable here because all parties to the merger were Delaware corporations, the merger had already taken place. *See* Del.Code Ann. tit. 8 §§ 251-263 (1983 & Supp.1988). The FTC's consent order did not undo the legal effect of this merger; it merely forestalled the complete integration of Lucky and Alpha Beta. The district court thus misunderstood the legal status of the merger, and this error compounded its misapprehension of the law of divestiture.

[12] The purpose of the consent order was to preserve the FTC's ability to seek divestiture if American Stores did not comply with its conditions. But California, unlike the FTC, cannot obtain divestiture relief. Under these circumstances, we do not believe that California,

which is otherwise not entitled to divestiture, should be able to bootstrap itself into this remedy, even temporarily, by virture of a consent order designed to protect the rights of the FTC, which is entitled to sue for divestiture. Preliminary injunctive relief should be narrowly tailored, and should be no more burdensome than necessary to preserve a plaintiff's ability to obtain the complete permanent relief to which it is entitled. *See Zepeda*, 753 F.2d at 728 n. 1. There must be some reasonable relationship between the preliminary injunction and the permanent relief requested: the preliminary relief granted should ensure the availability of permissible permanent relief sought. That relationship is missing from the preliminary injunction granted here, particularly in light of the district court's misapprehension of the law of divestiture and merger. In these circumstances, we conclude that the preliminary injunction was overly broad. *See BNS*, 858 F.2d at 465-66 (overly broad preliminary injunction an abuse of discretion). We therefore hold that to the extent that the district court ordered American Stores to operate its subsidiaries separately, the district court abused its discretion. *See id.; See also Zepeda*, 753 F.2d at 724 (preliminary injunction may be reversed because court applies "acceptable preliminary injunction standard in a manner that results in an abuse of discretion").

Our holding does not foreclose California's ability to obtain injunctive relief. To the contrary, relief "directed at the symptoms rather than the underlying cause" remains available. *IT & T*, 518 F.2d at 925. On remand, the district court is free to consider granting such relief.

We do not believe that our holding puts California in an untenable position in future cases. California could have sued several months earlier and attempted to enjoin the merger before the stock sale was completed. The Attorney

General chose not to do so. California must accept the consequences of his choice.

VI

[13] American Stores appeals the district court's order denying its motion to dismiss for failure to state a claim upon which relief can be granted. American Stores submitted voluminous materials outside the pleadings which the district court considered. Rule 12(b)(6) of the Federal Rules of Civil Procedure provides: "If . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment. . . ." *See, e.g., Grove v. Mead School District No. 354*, 753 F.2d 1528, 1532-33 (9th Cir.), *cert. denied*, 474 U.S. 826, 106 S.Ct. 85, 88 L.Ed.2d 70 (1985); *Garaux v. Pulley*, 739 F.2d 437, 439-40 (9th Cir.1984). Thus, we review American Stores's motion as one for summary judgment. Because no final judgment has been entered in this case, and the denial of a motion for summary judgment is not a final order, we lack jurisdiction to entertain American Stores's motion. *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976).

Each side should bear its own costs.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

APPENDIX B

THE STATE OF CALIFORNIA, BY ITS ATTORNEY GENERAL JOHN K. VAN DE KAMP,
Plaintiff,

v.

AMERICAN STORES COMPANY, ALPHA BETA ACQUISITION CORP., LUCKY STORES, INC.,
Defendants.

No. CV 88-5331 KN.

United States District Court,
C.D. California.

Sept. 29, 1988.

State of California brought action to enjoin merger of assets and businesses of two grocery store chains. The District Court, Kenyon, J., held that: (1) State established prima facie violation of § 7 of Clayton Act; (2) two supermarket chains failed to rebut presumption that their proposed merger would substantially lessen competition in violation of § 7 of Clayton Act; and (3) State of California was entitled to preliminary injunction to enjoin merger.

Injunction issued.

1. Monopolies 24(12)

Presumption of Clayton Act violation based on post-merger market statistics is not conclusive and can be overcome, but only by showing that statistics do not accurately reflect probable effect of proposed merger on

competition. Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

2. Monopolies 24(13)

In order to analyze whether statistical evidence on market concentration resulting from particular proposed merger establishes presumption that merger may substantially lessen competition in violation of Clayton Act, relevant product and geographic markets in which competition may be affected must be defined. Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

3. Monopolies 24(13)

State established prima facie violation of § 7 of Clayton Act in action to enjoin merger of assets and businesses of two supermarket chains; statistical evidence concerning postmerger market shares and concentration, as well as market concentration trends, overwhelmingly created presumption that increased concentration in relevant markets, which would result from proposed merger, would substantially lessen competition. Clayton Act, § 7, 15 U.S.C.A § 18.

4. Monopolies 24(12)

Presumption that proposed merger violates Clayton Act if it results in merged business having certain percentage of market share is not irrebutable but can be overcome by evidence that market share statistics give inaccurate account of merger's probable effect on competition. Clayton Act, § 1 et seq., 15 U.S.C.A. § 12 et seq.

5. Monopolies 24(12)

Two supermarket chains failed to rebut presumption that their proposed merger would substantially lessen

competition in violation of § 7 of Clayton Act; supermarket chains failed to demonstrate ease of entry into retail grocery industry, and merger could not be justified on basis that it would allow greater efficiency of operation. Clayton Act, § 7, 15 U.S.C.A § 18.

6. Monopolies 28(9)

Clayton Act allows any person to sue for injunctive relief against threatened loss or damage by violation of antitrust laws. Clayton Act, § 16, 15 U.S.C.A. § 26.

7. Monopolies 24(7)

State of California was entitled to preliminary injunction to enjoin merger of assets and businesses of two supermarket chains; Californians would be irreparably harmed by decrease in competition if proposed merger was completed, if preliminary relief was not awarded and merger was subsequently found to be unlawful it would be extremely difficult if not possible to effectively remedy the unlawful merger, and harm to California residents outweighed any harm supermarket chains would suffer as result of injunction. Clayton Act, § 16, 15 U.S.C.A. § 26.

John K. Van de Kamp, Los Angeles, Cal., pro se.

Andrea Sheridan Ordin, Sanford N. Gruskin, Owen Lee Kwong, H. Chester Horn, Jr., Lawrence R. Tapper, Ernest Martinez, Los Angeles, Cal., for State of Cal.

Frank Rothman, Stephen M. Axinn, Paul T. Denis, Skadden, Arps, Slate, Meagher & Flom, Los Angeles, Cal., for defendants.

ORDER RE PRELIMINARY INJUNCTION; PRELIMINARY INJUNCTION

KENYON, District Judge.

The Court, having received and considered Plaintiff State of California's Application for a Preliminary Injunction and the papers filed in support thereof and in opposition thereto, HEREBY GRANTS Plaintiff's application.

I

BACKGROUND

Plaintiff, State of California, through its Attorney General, John K. Van de Kamp, ("State") brought this action to enjoin the merger of the assets and businesses of Lucky Stores, Inc. ("Lucky") and American Stores Company, Alpha Beta Acquisition Corporation, and their respective subsidiaries ("Alpha Beta").

The parties to this proposed merger are the first and fourth largest supermarket chains in California and two of the ten largest grocery chains in the United States. Both Alpha Beta and Lucky are principally engaged in the retail sale of food and related products for off-premises consumption. In California, Alpha Beta operates 252 "Alpha Beta" and "Skaggs Alpha Beta" retail supermarkets. Lucky operates 340 "Lucky Stores" and "Lucky Food Basket" retail supermarkets. Memorandum In Opposition for Motion For Preliminary Injunction at 4 ("Opp. to Inj."). The proposed Lucky/Alpha Beta acquisition follows on the heels of a merger by the second and third largest grocery chains in California, Vons and Safeway.

The State's purpose in seeking the preliminary injunction is "to maintain the status quo for consumers — the existence of at least three competing supermarket chains." Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order at 4 ("TRO Application"). The State maintains that the effect of the Lucky/Alpha Beta proposed merger may be substantially to lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18; Section 1 of the Sherman Act, 15 U.S.C. § 1; the Cartwright Anti-Trust Act, California Business and Professions Code, sections 16770, *et seq.*; and the Unfair Business Practices Act, California Business and Professions Code, sections 17200, *et seq.*

II.

DISCUSSION

In order to grant a preliminary injunction, the Court must consider the following factors: (1) Whether plaintiff has demonstrated, at the minimum, a fair chance of success on the merits. *Benda v. Grand Lodge of Int'l Ass'n of Machinists & Aerospace Workers,* 584 F.2d 308, 315, (9th Cir.1978), *cert. dismissed,* 441 U.S. 937, 99 S.Ct. 2065, 60 L.Ed.2d 667 (1979); (2) Whether plaintiff has demonstrated a significant threat of irreparable injury. *Oakland Tribune, Inc. v. Chronicle Publishing Co.,* 762 F.2d 1374, 1376 (9th Cir.1985); and (3) Whether plaintiff has demonstrated at least a minimal tip in the balance of

hardships even when the strongest showing on the merits is made. *Los Angeles Memorial Coliseum Comm'n v. National Football League,* 634 F.2d 1197, 1203-04 (9th Cir.1980). As the Ninth Circuit stated in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,* 526 F.2d 86, 87 (9th Cir.1975), a court may issue a preliminary injunction if the moving party demonstrates "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips sharply in his favor." The court has stated that these two tests are not inapposite but merely extremes of a single continuum:

> The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly.

Benda, 584 F.2d at 315. In *FTC v. Warner Communications Inc.,* 742 F.2d 1156, 1162 (9th Cir.1984), the Ninth Circuit reversed the district court's denial of the Federal Trade Commission's ("FTC") application for a preliminary injunction on the grounds that the government had adequately met its burden of demonstrating likelihood of success on the merits. The FTC brought an action to block a proposed joint venture involving two record companies. In determining whether 'likelihood of success' had been established, the court noted that its task was "not to make a final determination on whether the proposed merger violates Section 7 (of the Clayton Act), but rather to make only a preliminary assessment of the merger's impact on competition." *Id.*

A. The Prima Facie Case

[1] Case law has established guidelines for determining whether the effect of a proposed merger may be "substantially to lessen competition" in violation of the Clayton Act.

> [A] merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.

United States v. Philadelphia National Bank, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963) (finding that where top four firms had market share of 78%, post-merger market share raised inference merger was anticompetitive). The Court further stated that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Id.* at 365 n. 42, 83 S.Ct. at 1742-43 n. 42. Statistical evidence of market share and concentration resulting from a merger can establish a prima facie case or the presumption that the proposed merger would substantially lessen competition in violation of the Clayton Act. *United States v. Marine Bancorporation, Inc.,* 418 U.S. 602, 631, 94 S.Ct. 2856, 2874, 41 L.Ed.2d 978 (1974). The presumption of a Clayton Act violation based on the post-merger market statistics is not conclusive and can be overcome, but only by a showing that the statistics do not accurately reflect the probable effect of the proposed merger on competition. *Id. See also United States v. Gen-*

eral Dynamics Corp., 415 U.S. 486, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974).

Recent cases use a variety of statistical indicators to determine whether a proposed merger can be presumed to substantially lessen competition. Post-merger market share is one indicator. Indicators of market concentration can be developed by determining the total percentage of market share held by the top two, three, four, etc. firms before and after the merger. The Herfindahl-Hirshman Index, ("HHI"), is another means to analyze market concentration. The HHI is calculated by summing the squares of the percentages of market share held by each of the firms in a given market, and therefore reflects the distribution of the market shares of the entire market, not just the top few firms.

Under the 1984 version of the Merger Guidelines of the United States Department of Justice, an HHI between 1000 and 1800 suggests a moderately concentrated market, and an HHI above 1800 suggests a highly concentrated market. Where the post-merger market would be in the moderately concentrated range, a merger that increases the HHI by more than 100 points will, absent other factors, present serious antitrust questions. Where the post-acquisition market would be highly concentrated, an increase of more than 50 HHI points will present serious antitrust questions. Dept. of Justice, *Merger Guidelines*, ¶ 2, 49 Fed.Reg. 26823 (1984). *See, e.g., RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir.1979) (merger of second and fifth largest firms found anticompetitive where result was post-merger market share increase from 12% to 19%, four-firm concentration increase from 65% to 72%, and eight-firm concentration increase from 81% to 84%); *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co., Inc.*, 600 F.Supp. 1326 (E.D.Mich.), *aff'd*,

753 F.2d 1354 (6th Cir.1985) (proposed merger found to substantially lessen competition based on statistical evidence of post-merger market share of 31%, four-firm concentration increase from 78% to 89%, HHI increase from 1746 to 2120, and general trend toward concentration); *Marathon Oil Co. v. Mobil Corp.*, 530 F.Supp. 315 (N.D.Ohio), *aff'd*, 669 F.2d 378 (6th Cir.1981) (acquisition enjoined based on post-merger combined market share of 10-20% in relevant markets, four-firm concentration increase from 48% to 53% on average, and general trend toward concentration.) *Cf. United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir.1984) (prima facie illegality of merger based on post-merger market share of 49% successfully rebutted by evidence that market power did not result).

[2] In order to analyze whether the statistical evidence of market concentration resulting from a particular proposed merger establishes a presumption that the merger may substantially lessen competition in violation of the Clayton Act, the relevant product and geographic markets in which competition may be affected must be defined. *Marine Bancorporation*, 418 U.S. at 618, 94 S.Ct. at 2868. "[T]he outer boundaries of a product market can be determined by the 'reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it.'" *RSR*, 602 F.2d at 1317, 1320, citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325, 82 S.Ct. 1502, 1523-1524, 8 L.Ed.2d 510 (1962). The effects of a merger must also be examined in each well-defined and economically-significant product submarket. *Id.* at 1320-21. Products which are reasonably interchangeable are "products to which consumers would switch if there were a small but significant non-transitory price increase." *United States v. Calmar, Inc.*, 612 F.Supp. 1298, 1301 (D.N.J. 1985).

The State defines the relevant product market in this case as "supermarkets," full line grocery stores with more than 10,000 square feet. The State contends that, realistically, only such supermarkets compete for the consumers' weekly or periodic grocery shopping needs and other outlets which also sell groceries, such as convenience stores, etc., serve consumers' needs in a distinctly separate market. TRO Application at 10-12. Defendants, on the other hand, contend that the relevant product market includes retail grocery purchases from a far wider range of outlets and should include groceries sold by smaller "mom and pop" retail grocery stores, convenience stores, and non-grocery stores such as department stores, gasoline service stations, eating and drinking places, drug stores, and liquor stores. Max Supp. Decl. at 2. Defendants argue that these outlets directly compete with supermarkets for the grocery dollar of the consumer, and contend, for example, that convenience stores frequently match or undercut supermarket prices. Opp. to Inj. at 13-14. *Cf. The Grand Union Co.*, 102 F.T.C. at 1046-47 (noting that determination of which non-supermarket food retailers to include in product market line is somewhat arbitrary).

The Court is not persuaded that the relevant product market in this case contains food purchases from the broad range of outlets contended by defendants, nor that grocery shoppers seriously consider, for example, gasoline service stations or department stores as competing sources with supermarkets for their grocery needs. Even if convenience stores competitively price a few food items, such as bread and milk, in direct competition with supermarkets, such is not sufficient to justify inclusion of all retail grocery sales from whatever outlet in the relevant product market in this case. In fact, the State has presented evidence that defendants' own marketing documents focus on supermarket shoppers and competition from other supermarkets and do not evaluate convenience stores, gasoline service stations, etc. as competitors. TRO Application at 11.

The relevant geographic market must "correspond to the commercial realities of the industry and be economically significant." *RSR*, 602 F.2d at 1323, quoting *Brown Shoe*, 370 U.S. at 336-37, 82 S.Ct. at 1529-30. Defendants define the relevant geographic area as 14 individual Metropolitan Statistical Areas, ("MSAs"), as defined by the Office of Management and Budget.[1] Opp. to Inj. at 9. The State, however, contends that these areas are too large to represent a relevant geographic market and that they ignore natural boundaries and practical realities. For example, the San Diego MSA is an area 60 miles by 60 miles, Transcript of Proceedings, September 16, 1988, at 63, an area which the State contends is too large to represent the trading area served by an individual grocery store, and which aggregates stores which are simply not in substantial competition with each other. The State argues that, instead, there are a number of distinct markets within these 14 MSAs totaling 62 separate relevant geographic markets. TRO Application at 12-15; Harris Decl. at 33-54.

However, because acceptance of either of these definitions of relevant geographic markets is not dispositive to the outcome of the current analysis, the Court will for now assume that the defendants can prevail at trial on their contention that the relevant geographic markets are represented by the fourteen MSAs they have defined.

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[1]The 14 MSAs are: Los Angeles, Santa Barbara, Anaheim, Bakersfield, Oxnard/Ventura, Riverside/San Bernardino, San Diego, Oakland, Monterey/Salinas, San Francisco, San Jose, Santa Cruz, Santa Rosa, and Vallejo/Napa.

As defined above, the statistical indicators of market share and concentration in the relevant markets resulting from the proposed merger of the Lucky and Alpha Beta supermarket chains can be analyzed to determine whether the merger is inherently likely to lessen competition substantially. Across the fourteen MSAs defined by defendants, the post-merger market share would be significant, averaging 24%, with a range from 15% to 38% in individual MSAs. Two firm concentration would increase from a pre-merger average of 51% (range, 35%-70%) to a post-merger average of 56% (range, 46%-73%). Four firm concentration would increase from an average of 73% (range, 62%-84%) to a post-merger average of 79% (range, 67%-88%). Harris Decl., Appendix II at 111-320. These numbers indicate the proposed merger would result in further concentration of an already highly concentrated market. Even using the defendants' more expansive definition of the relevant product market, the post-merger market share would still be significant, averaging 19%, and the four firm concentration would be 56%, still indicating a highly concentrated market. Defendants' Supplemental Memorandum Re Market Definition and Market Structure, Exh. B ("Def. Market Memo.").

The parties submitted vast quantities of data showing calculation of post-merger HHIs and the corresponding HHI increase resulting from the proposed merger. Suffice it to summarize that across the 14 MSAs defined in this case and based on "supermarkets" as the relevant product market, post-merger HHIs average 2040 (range, 1416-2769), with 10 of the 14 MSAs individually exceeding the 1800 level, indicating a highly concentrated market. The increase in HHI due to the proposed merger averaged 245 points across the 14 MSAs and was at least 100 points in

each MSA, therefore raising serious antitrust concerns.[2] Harris Reply Decl. at 17.

Even considering the more expansive relevant product market definition argued by the defendants, the Court notes that the first set of data supplied by defendants showed an average post-merger HHI across the 14 MSAs of 1250, with an average increase in HHI due to the merger of 130 points. Max Decl., Exh. 3 at 38. Such numbers indicate antitrust concerns and, specifically, in 9 of the 14 individual MSAs, the individual post-merger HHI and corresponding HHI increase indicated antitrust questions. Defendants subsequently expanded their definition of the relevant product market even further, and therefore produced a second set of data bringing the average post-merger HHI down to 990, with an average increase of 100 points, and specifically showing antitrust concerns under the Merger Guidelines in only three individual MSAs. Def. Market Memo., Exh. A; Max Supp. Decl., Exh. 5. Defendants contend that these numbers show that none of the relevant markets will be unduly concentrated or significantly increased in concentration as a result of the proposed merger. Def. Market Memo. at 22.[3]

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[2]If the relevant geographic market is defined in terms of 62 smaller geographic markets as contended by the State, the post-merger HHI averages 2380, with an average increase of 250 points due to the proposed merger. Harris. Decl. at 69-70.

[3]Defendants contend that their updated calculation of, for example, the Santa Cruz MSA's post-merger HHI (by their most recent and expansive product market definition) at 998 conclusively raises no competitive concerns despite an HHI increase of 110 points, while implicitly stating that competitive concerns would be raised if the Santa Cruz post-merger MSA had been 1001. Max Supp. Decl. at 3. Such precision, however, is more than the calculation HHIs, as

The Court also requested additional briefing by the parties on market share trends in the relevant markets. Although the defendants contend that their data shows a decrease in market concentration, Def. Market Memo. at 3, the more extensive data provided by the State clearly shows a substantial trend to increased concentration in all but one MSA using the State's definition of the relevant product market, and in at least two-thirds of the relevant MSAs using defendants' definition of the relevant product market. On average across all MSAs, concentration in the relevant product markets as defined by either party's definition has increased by over 30% since 1982, excluding the effects of this proposed merger. Harris Supp. Reply Decl. at 5-17.

[3] The Court finds that the statistical evidence concerning post-merger market shares and concentration, as well as market concentration trends, overwhelmingly creates the presumption that the increased concentration in the relevant markets which would result from the proposed merger between the Lucky and Alpha Beta supermarket chains would substantially lessen competition in those markets, and presents a prima facie violation of Section 7 of the Clayton Act.

B. Ease of Entry

[4] The presumption that a proposed merger violates the Clayton Act if it results in a certain percentage of market share is not irrebuttable. *United States v. General Dynamics*, 415 U.S. 486, 494-504, 94 S.Ct. 1186, 1192-1197, 89 L.Ed.2d 530 (1974). The presumption can be overcome by evidence that the market share statistics give an inaccurate account of the merger's probable effect on

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indicators of market concentration and antitrust concerns, can conclusively provide.

competition. *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 120, 95 S.Ct. 2099, 2118, 45 L.Ed.2d 41 (1975). The burden of proof, however, rests squarely on defendants. *Marine Bancorporation*, 418 U.S. at 618, 94 S.Ct. at 2868. Therefore, even if a merger results in a high degree of concentration, if a firm can easily enter into the market, it is unlikely that the remaining producers in the market will be able to exercise market control. *United States v. Clamar, Inc.*, 612 F.Supp. 1298, 1301 (D.N.J.1985).

In general, the lower the barriers to entry, the less likely it will be that, as a consequence of acquisition, remaining firms in the target market can successfully raise prices by "unilateral action, interdependent coordination or express collusion." *United States v. Hughes Tool Co.*, 415 F.Supp. 637, 644 (C.D.Cal.1976) (stating that substantial entry and exit rates in firms and products indicates that entrance is relatively easy and that healthy competition is present within relevant market). On the other hand, where barriers to entrance into the target market are high, a merger or acquisition may create a potential for significant market power that is "unlikely to be tempered by the threat that future entry will prevent or frustrate anticompetitive output and pricing decisions by firms in the target market." *The Grand Union Co.*, 102 F.T.C. 812, 1064 (1983). Evidence of low entry barriers includes recent entry into the target market, or recent capacity expansion by existing competitors in that market. *Id.* In *Tasty Baking Co. v. Ralston Purina, Inc.*, 653 F.Supp. 1250, 1263 (E.D.Pa.1987), the court found substantial barriers to entry in the snack cake and pie business. The barriers plaintiffs' experts discussed included the high cost to build bakeries; to develop brand recognition; and to establish routes with favorable retailer participation. *Id.* In concluding that defendants had

failed to meet their burden of proof that entry barriers did not exist and in granting a preliminary injunction, the court stated that since "[d]efendants presented no significant evidence that existing producers will enter these relevant markets as new competitors within the foreseeable future, . . . I find plaintiffs likely to prove that the existing market shares provide a meaningful basis on which to evaluate the future significance of the acquisition." *Id.* at 1264.

While the Supreme Court has never directly held that ease of entry may rebut a showing of prima facie illegality under *Philadelphia National Bank*, it has held that potential competition from firms not presently active in the relevant product and geographic markets must be taken into account. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 93 S.Ct. 1096, 35 L.Ed.2d 475 (1973) (concluding that existence of Falstaff brewer as potential entrant might constrain brewers in northeast to maintain competitive price levels as means of forestalling entry by Falstaff). *See* 4 von Kalinowski, Antitrust Laws and Trade Regulation § 19.02[3] n. 120 (1979) (stating that conditions of entry have been identified as one of the two most important factors constraining a firm to behave competitively, the other factor being "numbers").

In *United States v. Waste Management, Inc.*, 743 F.2d 976, 981 (2d Cir.1984), the court considered ease of entry in the trash collection market and concluded that entry into the market was "so easy that any anti-competitive impact of the merger before us would be eliminated more quickly by such competition than by litigation." As foundation for this conclusion, the court stated that "[a] person wanting to start in the trash collection business can acquire a truck, a few containers, drive the truck himself and operate out of his home." Entrants into the

supermarket industry, unlike the trash collection market, can face a much more complex array of barriers. Typically, the ease or difficulty with which a firm can enter a given industry depends on such factors as: (1) amount of capital necessary to become a competitor in the market; (2) availability of capital; (3) availability of technological advancements; (4) number and size of customers or firms already operating in the market; and (5) structure and nature of the industry. 4 Antitrust Laws and Trade Regulation § 19.02[3].

[5] As the Supreme Court stated in *Marine Bancorporation*, 418 U.S. at 602, 94 S.Ct. at 2860, the burden is on defendants to rebut the presumption of illegality demonstrated by the market share percentage. Defendants have failed to demonstrate evidence of low entry barriers. Although defendants assert that entry into the California market is easy, their lack of evidence to support this contention produces an inference to the contrary. According to defendants, supermarkets in California can be opened rapidly and without obstacles in response to any opportunity to earn a good level of return. Max Decl. at 14. Yet, defendants have produced no evidence of such an occurrence. Moreover, defendants' declarations assert that sites for new construction or remodeling are readily available but fail to explain who has taken advantage of this abundance of available space. Guillory Decl. ¶ 5-9. Defendants submit through a declaration of Keith Thye that entry is further facilitated by grocery product wholesalers actively involved in selecting and obtaining sites for new entrants; financing the purchase of inventory, fixtures and equipment; and providing back office assistance such as data processing. Thye Decl. ¶ 9-11. Mr. Thye, president and Chief Operating Officer of Market Wholesale Grocery Co., however, plans to purchase 15 of the 37 stores that Alpha Beta and Lucky are required to

divest in accordance with the FTC consent order. Consequently, entry barriers may not appear to him to be too high. Defendants also submit the declaration of Richard London, an independent consultant to Lucky Stores and president of Major Market, Inc., a company formed to open, own and operate a chain of grocery stores in Southern California. Mr. London contends that the grocery business is extremely competitive, that entry barriers are low, and that there is certainly room for a new chain of grocery stores in the Southern California area. London Decl. ¶ 7-8. However, defendants' declarations appear to be based on entry into a far broader product market than the Court believes is appropriate. See discussion, *supra* at 1129.

The defendants advance the additional argument that the merger can be justified because it allows greater efficieney of operation. Lillie Decl. ¶ 5. John M. Lillie, chairman of the board and chief executive officer of Lucky, declared that the blending of Alpha Beta and Lucky's manufacturing plants, warehouses and transportation system coupled with further efficiencies and synergies will result in approximately $50 million in annual shelf price reductions to California consumers. *Id.* Edgar H. Grubb, senior vice president and chief financial officer of Lucky, stated that efficiencies resulting from the combination of Lucky and Alpha Beta will generate annual cost savings of at least $78.1 million. Grubb Decl. ¶ 6. The Supreme Court has clearly rejected this efficiency argument in *Philadelphia National Bank*, 374 U.S. at 370, 83 S.Ct. at 1745, and the Ninth Circuit reiterated the rejection in *RSR Corp.*, 602 F.2d at 1325. In *RSR*, the court stated, "RSR argues that the merger can be justified because it allows greater efficiency of operation. This argument has been rejected repeatedly.", *Id.* Moreover, even assuming these efficiency savings do result, the

Court is not convinced that defendants will invariably pass these savings on to consumers. As the State queried, "And, most importantly, is it really true that the new firm can achieve $50 million in savings after servicing the debt they assumed in leverage [sic] this $2.5 billion buy-out?" Supplemental Memorandum of Points and Authorities in Support of Plaintiff's Application for a Preliminary Injunction at 8 ("Pl. Supp. Memo."). The State asserts, to the contrary, that prices will rise since there exists a direct correlation between increased concentration and high prices. Mueller Reply Decl. ¶ 6. The Court concludes that defendants have not met their burden of demonstrating that the statistics do not accurately reflect the probable effect of the proposed merger on competition. *Marine Bancorporation,* 418 U.S. at 631, 94 S.Ct. at 2874-75.

C. Injunctive Relief Under the Clayton Act

[6] Section 16 of the Clayton Act allows any person to sue for injunctive relief against threatened loss or damage by a violation of the antitrust laws. 15 U.S.C. § 26 (1979). Section 16 is designed to stop anticompetitive behavior in its incipiency. The Ninth Circuit in *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.* ("ITT"), 518 F.2d 913, 925 (9th Cir.1975), found that injunctive remedies under § 16 "may be as broad as necessary to ensure that threatened loss or damage does not materialize or that prior violations do not recur." The court futher stated that if the direct injunctive restraint proves too burdensome, then "a possible recourse [for the enjoined party] is to stipulate to divestiture as an alternative." *Id.*

The State requests a preliminary injunction "preventing and restraining [Alpha Beta and Lucky], and all persons acting on their behalf, from taking any action,

either directly or indirectly, in furtherance of the proposed acquisition of Lucky, and requiring Alpha Beta to hold and operate separately all of Lucky's California assets and businesses pending final adjudication of the merits of this action; and ... such injunctive relief, including recission ... as is necessary and appropriate to prevent the effect of the unlawful activities alleged." Complaint at 14. Furthermore, the State seeks to "permanently enjoin [Alpha Beta and Lucky from carrying out any agreement, understanding, or plan, the effect of which would be to combine the supermarket business of [Alpha Beta] and Lucky." *Id.*

Defendants maintain that a permanent injunction is tantamount to divestiture since Alpha Beta and Lucky have already merged and the egg has already been scrambled. This argument, however, contravenes the very purpose of the Federal Trade Commission Agreement to Hold Separate ("Hold Separate Agreement"). According to the Hold Separate Agreement of May 18, 1988, "[Alpha Beta] shall hold separate ... the Lucky California Operation ("California Operation") which consists of 362 grocery stores, inventory, trademarks and trade names, warehouses, distribution and manufacturing facilities and all related property and facilities." Under the Hold Separate Agreement, Alpha Beta is required to:

- assure that the California Operation maintain separate financial and operating books and records;
- prevent any waste or deterioration of the California Operation;
- refrain from replacing any executive of the California Operation except to fill a vacancy;
- assure the maintenance of the California Operation as a viable competitor while allowing the California Operation warehouse, distribution and manufacturing facilities to supply stores operated by Alpha Beta during the pendency of the Hold Separate Agreement;
- refrain from selling or otherwise disposing of the warehouse, distribution or manufacturing facility or any retail grocery stores of the California Operation during the pendency of the Hold Separate Agreement;
- separate purchasing for the Alpha Beta and California Operation so that it is done by each entity for its retail grocery sales.

FTC Hold Separate Agreement, ¶ 3 (a)-(f). The Hold Separate Agreement is still in effect. If the Hold Separate Agreement has meaning, this is *not* a completed merger. Alpha Beta and Lucky, pursuant to the Hold Separate Agreement, are performing numerous functions as separate entities. They retain their separate names and with them their respective corporate identities. While defendants maintain that it is "verbal calisthenics"[4] to issue

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[4]The Ninth Circuit, in *ITT* warned against indirect divestiture, enjoining the activities of a corporation to such a degree that divestiture would be the only economical choice available to that corporation. *ITT*, 518 F.2d at 924. In the next paragraph of the opinion, the court goes on to say that while divestiture is not available, injunctive remedies may be as broad as necessary to ensure that threatened loss or damage does not materialize. *Id.* Unlike the Ninth Circuit cases addressing the issue of the availability of divestiture, the instant case involves a Section 7 attack on a proposed merger which has an FTC hold separate order in place. In *ITT* plaintiff brought suit in 1967 to force the divestiture of subsidiaries defendant had acquired beginning in 1950. *Id.* at 915. *See also Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir.1976) (plaintiff sought relief directed to a subsidiary defendant had acquired at least one year before); *Bosse v. Crowell Collier &*

injunctive relief to stop a merger contending that such is tantamount to divestiture, they, nevertheless, ask the Court to perform a linguistic triathalon to understand how a Hold Separate Agreement is equivalent to a completed merger. The Court is unable to make such a leap in reasoning.

1) Whether Plaintiff Has Shown Irreparable Injury

[7] The State, acting in its capacity as *parens patriae* on behalf of its residents, has alleged that Californians will be irreparably harmed if the proposed merger is completed. Lessening of competition, the State maintains, is recognized as precisely the kind of irreparable injury that the interlocutory remedies under the Clayton Act were intended to prevent. TRO Application at 32. Unless restrained, the State submits that defendants will rapidly restructure the newly-acquired company and its assets and disable the acquired chain from operating independently of the parent. *Id.* As the Court stated in *Christian Schmidt Brewing Co. v. G. Heileman Brewing Co.*, 600 F.Supp. 1326, 1332 (E.D. Mich.), *aff'd*, 753 F.2d 1354 (6th Cir.1985), prospective relief is a more effective remedy for an unlawful merger than retrospective relief. Moreover, if preliminary relief is not awarded and the merger is subsequently found to be unlawful, it would be extremeley difficult, if at all possible, to remedy effectively the unlawful merger. *Id.* If the Court is to make a determination as to whether this merger is anticompetitive, the State is correct in its assertion that the egg must be examined before it becomes an omlette. The Court therefore finds that plaintiff has made an adequate showing of irreparable injury.

MacMillan, 565 F.2d 602, 607 (9th Cir.1977) (plaintiff, former shareholder, sought to recover stock pledged on loan subsequently foreclosed upon).

2) Balancing the Hardships

Defendants argue that if preliminary relief is granted, they will suffer irreparable harm which far outweighs any possible risk that the proposed merger will lessen competition. According to defendants, Alpha Beta already has spent $2.5 billion to acquire Lucky; has sold or entered into contracts to sell substantial assets of Lucky; and has placed its Alpha Beta operations under the control of the Lucky management with the full knowledge of the State. Opp. to Inj. at 12. Furthermore, defendants maintain that the State is guilty of laches for delay in bringing this antitrust suit.

Although the Court agrees that suits of this sort must be filed in a timely manner, the Court finds that the State conducted this investigation as swiftly as was responsibly possible; informed defendants that the State intended to have the procedures contemplated by the Hart-Scott-Rodino Act run their course; and repeatedly warned Alpha Beta that failure by the FTC to remedy the State's antitrust concerns could result in this action. Pl. Supp. Memo. at 8. On May 31, 1988, the FTC tentatively approved the merger. During the public comment period following the tentative approval, the State filed comments urging the FTC to withdraw its tentative consent order for the Lucky/Alpha Beta merger. On August 31, 1988, the FTC gave final approval of Alpha Beta's acquisition of Lucky subject to divestiture of 31 to 37 stores. The State filed suit on September 1, 1988. Defendants claim that injunctive relief must be denied because the State unconscionably delayed by not bringing this action before closing of the agreement between Lucky and Alpha Beta on June 2, 1988. Opp. to Inj. at 4, 30. It does not seem unreasonable for the State to have refrained from filing suit prior to even preliminary FTC approval. To require,

however, that they then file their action within a narrow three-day window would be unreasonable. As the First Circuit stated in *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 430 (1st Cir.1985):

> [I]t is contrary to equitable principles to permit some defendants to maintain an illegal market share merely because they were able to merge before any of their competitors could prevent it. This places a premium on gamesmanship and stealth, and allows anticompetitive mergers to be treated differently on the basis of the speed and skill with which the merger is consummated. Unfortunately, the public is also the loser under such an approach as it cannot bring its own suit except through the Justice Department and must rely on adventitious suits of private plaintiffs to maintain competitive conditions.

The Court is persuaded that the harm plaintiff would suffer if the merger is not enjoined far outweighs the harm defendants may suffer as a result of an injunction. The result of this balancing, coupled with the finding of strong likelihood that plaintiff will succeed on the merits, leads to the conclusion that this merger must be enjoined.

III.

CONCLUSION

The overwhelming statistical evidence has demonstrated a strong probability that the proposed merger will substantially lessen competition in violation of Section 7 of the Clayton Act. This showing has not been rebutted by clear evidence that the proposed merger will not, in fact, substantially lessen competition. Defendants have failed to demonstrate ease of entry into the retail grocery industry. This Court finds that unless defendants are

enjoined, the citizens of California will be substantially and irreparably harmed. While the court in no way belittles the harm defendants may suffer as a result of this preliminary injunction, the Court concludes that it is substantially less than the harm plaintiff would suffer if the merger is not enjoined.

ORDER

That defendants American Stores Company, Alpha Beta Acquisition Corporation, and Lucky Stores, Inc., and their respective successors and assigns, officers, directors, agents, subsidiaries, divisions, groups, affiliates, representatives, employees and attorneys, and all persons acting in concert or participation with them, shall, in accordance with Federal Rule of Civil Procedure 65, during the pendency of this action, be enjoined, restrained and ordered, pursuant to 15 U.S.C. § 26, as follows:

1. Take all steps necessary to operate American Stores Company, Alpha Beta Acquisition Corporation and their subsidiaries, divisions and groups (collectively "American Stores"), independently of the assets and businesses of Lucky Stores, Inc. ("Lucky") in the State of California.

2. Refrain from taking any action to modify the status quo as to the California operations of Alpha Beta or Lucky as of September 6, 1988, other than in the ordinary course of business, and shall refrain from taking any further steps to merge or integrate the assets and businesses of American Stores' Alpha Beta California operations with those of Lucky's California operations or any further steps to merge or integrate the assets and businesses of Lucky's California operations with those of American Stores' Alpha Beta California operations.

IT IS SO ORDERED.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,
Plaintiff-Appellee,

v.

AMERICAN STORES CO.; ALPHA BETA ACQUISITION CORP.; LUCKY STORES, INC.
Defendants-Appellants.

No. 88-6467

D.C. No. CV-88-5331

ORDER DENYING REHEARING

Appeal from the United States District Court
for the Central District of California

Before: WALLACE, POOLE, AND O'SCANNLAIN,
Circuit Judges.

The panel as constituted above has voted to deny the petition for hearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On August 10, 1989, I served the within Petition For Writ of Certiorari in re: John K. Van De Kamp vs. American Stores Company, Alpha Beta Stores, Inc., Lucky Stores, Inc., in the Supreme Court of the United States, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Frank Rothman, Esq.
Skadden, Arps, Slate, Meagher & Flom
300 South Grand
34th Floor
Los Angeles, CA 90071

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 10, 1989, at Los Angeles, California.

Gabriel M. Lopez

GABRIEL M. LOPEZ